



IFW

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In Re Application of: )  
)  
MORTON, FARAH ) Art Unit: 3632  
)  
Serial No. 10/716,247 ) Examiner: Hewitt, James M.  
)  
For: PORTABLE INFANT BED )  
)  
Filed: November 17, 2003 )  
\_\_\_\_\_ )

Certificate of Mailing

I hereby certify that this correspondence, including listed enclosures, is being deposited with the United States Postal Service as First Class Mail, postage prepaid, in an envelope addressed to: Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450 on September 23, 2005.

Signed: \_\_\_\_\_

Deniece Turner

**STATUS REPORT  
IN REISSUE APPLICATION (MPEP § 1410)**

Commissioner for Patents  
5 Alexandria, VA 22313

Dear Sir:

This status report is submitted pursuant to the continuing duty of the applicant to disclose the status of court proceedings concerning the within application pursuant to MPEP 10 § 1410. On March 25, 2005, the Court of Appeals for the Federal Circuit denied the patentee's petition for rehearing, affirming the judgment of non-infringement of patent 6,370,715 entered by the U.S. District Court for the Eastern District of California.

A copy of the 16-page Memorandum and Order from the District Court dated March 17, 2004, and a copy of the 2-page Order from the Court of Appeals for the Federal Circuit dated March 25, 2005 are attached hereto. There was no challenge to the validity of the patent in these court proceedings, so no new documents or materials material to patentability were developed during the litigation.

Dated: September 23, 2005

Respectfully Submitted,

By



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924102.25.reissue status.5

FILED

MAR 17 2004

CLERK, U.S. DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA  
BY \_\_\_\_\_

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

-----oo0oo-----

FARAH D. MORTON, an  
individual, and BABY DELIGHT,  
INC., a California  
corporation,

Plaintiffs,

v.

THE FIRST YEARS, INC., a  
Massachusetts corporation,

Defendant.

NO. CIV. S 03-2339 MCE DAD

MEMORANDUM AND ORDER

*c/mce*

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On Nov. 10, 2003, Plaintiffs Farah Morton and Baby Delight, Inc. (collectively "Morton") filed suit against Defendant The First Years, Inc. ("TFY"), claiming that TFY's product, the Close and Secure Sleeper ("CSS") infringes Morton's patent, U.S. Patent No. 6,370,715 ("the '715 patent").<sup>1</sup> On Nov. 20, 2003, Morton

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<sup>1</sup> Morton requests the Court take judicial notice of the '715 patent, and included a copy of said patent in her request (continued...)

35

1 filed a motion seeking a preliminary injunction against TFY  
2 enjoining the sale of CSS. TFY answered the complaint on  
3 December 1, 2003, and on January 12, 2004, filed a counter-motion  
4 for summary judgment of non-infringement. The matter is before  
5 the court now on those two motions. As explained below, Morton's  
6 motion for preliminary injunction is be DENIED, and TFY's motion  
7 for summary judgment of non-infringement is GRANTED.

8  
9 **BACKGROUND**

10  
11 In 1999, Plaintiff Farah Morton developed a portable infant  
12 bed designed to protect a baby when sleeping in the same bed as  
13 adults, and also for use as a portable bed for the baby. She  
14 applied for a patent on the invention in September of 1999, and  
15 as a result the U.S. Patent and Trademark Office ("USPTO") issued  
16 the '715 patent on April 16, 2002. Morton formed the corporation  
17 Baby Delight, Inc. to market the bed, which she called the  
18 "Snuggle Nest". Baby Delight, Inc. has an exclusive license to  
19 manufacture, use, sell, and/or offer to sell any product covered  
20 by the '715 patent. Morton Decl. ¶ 3.

21 In September of 2003, Morton attended the ABC Kid's Expo in  
22 Las Vegas, Nevada. While there, she observed TFY advertising and  
23 taking advance orders for CSS, a product they were preparing for  
24 market. CSS was very similar to Morton's own Snuggle Nest, and  
25

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26  
27 <sup>1</sup>(...continued)  
28 for judicial notice. As the Court finds the '715 patent a proper  
subject for judicial notice under Federal Rule of Evidence 201,  
Morton's request is granted.

1 she believed CSS infringed her '715 patent. The primary  
2 difference between the Snuggle Nest and CSS is that the side and  
3 end walls on the Snuggle Nest are detachable while CSS is formed  
4 of one piece of plastic such that the walls are not detachable.

5 As TFY was set to begin selling CSS in December of 2003,  
6 Morton filed her patent infringement complaint on November 10,  
7 2003, and this motion for preliminary injunction on November 20,  
8 2003. TFY opposed this motion and filed its own counter-motion  
9 for summary judgment of non-infringement on January 12, 2004.  
10 Oral argument on these motions was heard on February 9, 2004. As  
11 the Court finds as a matter of law that TFY's CSS does not  
12 infringe the '715 patent, Morton's motion for preliminary  
13 injunction is denied and TFY's motion for summary judgment is  
14 granted.

## 15 16 STANDARD

### 17 18 1. Motion for Preliminary Injunction

19  
20 Morton brings her motion for preliminary injunction under 18  
21 U.S.C. § 283, which provides a district court jurisdiction to  
22 grant injunctions "to prevent the violation of any right secured  
23 by patent, on such terms as the court deems reasonable." As an  
24 injunction issued under this section involves substantial matters  
25 unique to patent law, the decision whether to issue such an  
26 injunction is governed by the law of the United States Court of  
27 Appeals for the Federal Circuit rather than that of the Ninth  
28 Circuit. Hybritech Inc. v. Abbott Labs., 849 F.2d 1446, 1451

1 n.12 (Fed. Cir. 1988).

2 Under Federal Circuit law, when confronted with a request  
3 for a preliminary injunction, the following "four factors are  
4 evaluated in making the decision:

- 5 (1) The probability that the patentee will succeed on the  
6 merits at trial;  
7 (2) The irreparable harm to the patentee should the  
8 injunction be denied;  
9 (3) The balance of hardships between the patentee and the  
10 defendant of granting or denying the injunction;  
11 (4) The public interest."

12 Rhone-Poulenc Agrochime, S.A. v. Biagro W. Sales, Inc., No. CV-F-  
13 94-5734, 1994 U.S. Dist. LEXIS 20574, at \*6 (E.D. Cal. 1994)  
14 (citing H.H. Robertson, Co. v. United Steel Deck, 820 F.2d 384,  
15 387 (Fed. Cir. 1987)). No one factor is dispositive in this  
16 evaluation; "rather, the district court must weigh and measure  
17 each factor against the other factors and against the form and  
18 magnitude of the relief requested." Hybritech, 849 F.2d at 1451.

## 19 2. Motion for Summary Judgment

20

21 The Federal Rules of Civil Procedure provide for summary  
22 judgment when "the pleadings, depositions, answers to  
23 interrogatories, and admissions on file, together with  
24 affidavits, if any, show that there is no genuine issue as to any  
25 material fact and that the moving party is entitled to a judgment  
26 as a matter of law." Fed. R. Civ. P. 56(c). One of the  
27 principal purposes of Rule 56 is to dispose of factually  
28 unsupported claims or defenses. Celotex Corp. v. Catrett, 477

1 U.S. 317, 325 (1986).

2 Rule 56 also allows a court to grant summary adjudication on  
3 part of a claim or defense. See Fed. R. Civ. P. 56(a) ("A party  
4 seeking to recover upon a claim ... may ... move ... for a  
5 summary judgment in the party's favor upon all or any part  
6 thereof."); see also Allstate Ins. Co. v. Madan, 889 F. Supp.  
7 374, 378-79 (C.D. Cal. 1995); France Stone Co., Inc. v. Charter  
8 Township of Monroe, 790 F. Supp. 707, 710 (E.D. Mich. 1992).

9 The standard that applies to a motion for summary  
10 adjudication is the same as that which applies to a motion for  
11 summary judgment. See Fed. R. Civ. P. 56(a), 56(c); Mora v.  
12 ChemTronics, 16 F. Supp. 2d 1192, 1200 (S.D. Cal. 1998).

13 Under summary judgment practice, the moving party  
14 always bears the initial responsibility of informing  
15 the district court of the basis for its motion, and  
16 identifying those portions of 'the pleadings,  
17 depositions, answers to interrogatories, and admissions  
18 on file together with the affidavits, if any,' which it  
19 believes demonstrate the absence of a genuine issue of  
20 material fact.

21 Celotex Corp. v. Catrett, 477 U.S. at 323 (quoting Rule 56(c)).

22 If the moving party meets its initial responsibility, the  
23 burden then shifts to the opposing party to establish that a  
24 genuine issue as to any material fact actually does exist.

25 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,  
26 585-87 (1986); First Nat'l Bank v. Cities Serv. Co., 391 U.S.  
27 253, 288-89 (1968).

28 In attempting to establish the existence of this factual  
dispute, the opposing party must tender evidence of specific  
facts in the form of affidavits, and/or admissible discovery  
material, in support of its contention that the dispute exists.

1 Fed. R. Civ. P. 56(e). The opposing party must demonstrate that  
2 the fact in contention is material, i.e., a fact that might  
3 affect the outcome of the suit under the governing law, and that  
4 the dispute is genuine, i.e., the evidence is such that a  
5 reasonable jury could return a verdict for the nonmoving party.  
6 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 251-52  
7 (1986); Owens v. Local No. 169, Assoc. of Western Pulp and Paper  
8 Workers, 971 F.2d 347, 355 (9th Cir. 1987). Stated another way,  
9 "before the evidence is left to the jury, there is a preliminary  
10 question for the judge, not whether there is literally no  
11 evidence, but whether there is any upon which a jury could  
12 properly proceed to find a verdict for the party producing it,  
13 upon whom the onus of proof is imposed." Anderson, 477 U.S. at  
14 251 (quoting Improvement Co. v. Munson, 14 Wall. 442, 448, 20  
15 L.Ed. 867 (1872)). As the Supreme Court explained, "[w]hen the  
16 moving party has carried its burden under Rule 56(c), its  
17 opponent must do more than simply show that there is some  
18 metaphysical doubt as to the material facts .... Where the record  
19 taken as a whole could not lead a rational trier of fact to find  
20 for the nonmoving party, there is no 'genuine issue for trial.'" Matsushita, 475 U.S. at 586-87.

22 In resolving a summary judgment motion, the evidence of the  
23 opposing party is to be believed, and all reasonable inferences  
24 that may be drawn from the facts placed before the court must be  
25 drawn in favor of the opposing party. Anderson, 477 U.S. at 255.  
26 Nevertheless, inferences are not drawn out of the air, and it is  
27 the opposing party's obligation to produce a factual predicate  
28 from which the inference may be drawn. Richards v. Nielsen



1 Freight Lines, 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985),  
2 aff'd, 810 F.2d 898 (9th Cir. 1987).

## 4 ANALYSIS

### 6 1. Preliminary Injunction

8 The only element of the preliminary injunction test  
9 seriously in dispute is that of Morton's likelihood of success on  
10 the merits of her infringement case. As shown below, the Court  
11 finds as a matter of law that TFY's product, CSS, does not  
12 infringe on the '715 patent. Therefore, Morton will not succeed  
13 on the merits. The Federal Circuit has explained that "case law  
14 and logic both require that [Morton] cannot be granted a  
15 preliminary injunction unless [she] establishes both of the first  
16 two factors, i.e., likelihood of success on the merits and  
17 irreparable harm." Amazon.com, Inc. v. Barnesandnoble.com, Inc.,  
18 239 F.3d 1343, 1351 (Fed. Cir. 2001).

19 Accordingly, because Morton has not established a likelihood  
20 of success on the merits of her infringement claim, her motion  
21 seeking a preliminary injunction is denied.

### 23 2. Summary Judgment

25 In response to Morton's request for a preliminary  
26 injunction, TFY seeks summary judgment that its CSS does not  
27 infringe Morton's patent. "An infringement analysis requires two  
28 separate steps. First, the court must construe the claims

1 asserted to be infringed as a matter of law in order to establish  
2 their meaning and scope." Maxwell v. J. Baker, Inc., 86 F.3d  
3 1098, 1105 (Fed. Cir. 1996) (citing Markman v. Westview  
4 Instruments, Inc., 517 U.S. 370, 384 (1996)). The second step is  
5 to compare claims as construed to the allegedly infringing  
6 device. See id.

7 The dispute in this case centers around claim 1 of the '715  
8 patent. Claim 1 describes a portable infant bed containing three  
9 elements: (1) a support unit with detachable side and end walls  
10 attached to a flat base, (2) a fabric cover, and (3) a  
11 rectangular pad. It is only the support unit that is in question  
12 here. "To prove infringement, [Morton] must show that the [CSS]  
13 meets each claim limitation, either literally or under the  
14 doctrine of equivalents." PSC Computer Prods., Inc. v. Foxconn  
15 Int'l, Inc., 355 F.3d 1353, 1357 (Fed. Cir. 2004).

#### 17 A. Literal Infringement

18  
19 In order to find literal infringement, "the accused device  
20 must contain every limitation of the asserted claim." Maxwell,  
21 86 F.3d at 1105 (citing Laitram Corp. v. Rexnord, Inc., 939 F.2d  
22 1533, 1535 (Fed. Cir. 1991)). Morton does not contend that the  
23 CSS literally infringes any claim in the '715 patent. Claim 1 of  
24 the '715 patent claims a bed with a support unit consisting of a  
25 base and detachable walls. CSS does not have detachable walls;  
26 the entire support unit is formed out of one piece of plastic.  
27 Claim 2 of the '715 patent attempts to claim a support unit with  
28 integral walls, but, as Morton concedes, it was erroneously

1 drafted as a claim dependent on Claim 1 rather than an  
2 independent claim. Mot. Prelim. Inj. at 9, n.3. Therefore,  
3 although it seems to indicate a support unit with integral walls,  
4 claim 1 actually claims a support unit with detachable walls.  
5 Since CSS does not contain detachable walls, it does not  
6 literally infringe the '715 patent.

7  
8 **B. Doctrine of Equivalents**  
9

10 Although CSS "does not literally infringe, it may infringe  
11 under the doctrine of equivalents if the differences between the  
12 claimed invention and the accused device are 'insubstantial.'" Maxwell, 86 F.3d at 1105 (quoting Hilton Davis Chem. Co. v.  
13 Warner-Jenkinson Co., 62 F.3d 1512, 1517 (Fed. Cir. 1995) (en  
14 banc), rev'd on other grounds, 520 U.S. 17, 137 (1997)). As the  
15 patentee, Morton "may invoke this doctrine to proceed against a  
16 producer of a device 'if it performs substantially the same  
17 function in substantially the same way to obtain the same  
18 result'" as her patented device. Graver Tank & Mfg. Co., Inc. v.  
19 Linde Air Prods., 339 U.S. 605, 608 (1950) (Graver II) (quoting  
20 Sanitary Refrigerator Co. v. Winters, 280 U.S. 30, 42 (1929)).  
21 "The theory on which [the doctrine of equivalents] is founded is  
22 that 'if two devices do the same work in substantially the same  
23 way, and accomplish substantially the same result, they are the  
24 same, even though they differ in name, form, or shape.'" Id.  
25 (quoting Union Paper Bag Mach. Co. v. Murphy, 97 U.S. 120, 125  
26 (1877)).  
27

28 The essential inquiry in determining whether the doctrine of

1 equivalents leads to a finding of infringement is: "Does the  
2 accused product or process contain elements identical or  
3 equivalent to each claimed element of the patented invention?"  
4 Warner-Jenkinson Co. Inc. v. Hilton Davis Chemical Co., 520 U.S.  
5 at 40. An element is "a discretely claimed component of a patent  
6 claim." U.S. Patent and Trademark Office Glossary, available at  
7 <http://www.uspto.gov/main/glossary/index>.

8 In this case, the relevant element is the support unit with  
9 detachable sides. This, Morton claims, is equivalent to the  
10 support unit of the CSS even though that unit has integral sides  
11 which are not detachable. This argument has force if one looks  
12 only at the product's main purpose, that of securing and  
13 protecting a sleeping baby while in bed with adults. When used  
14 in that way, Morton's Snuggle Nest is the functional equivalent  
15 of the CSS. They both operate substantially the same way to  
16 prevent an adult from inadvertently rolling over onto the child  
17 and also to prevent the child from getting tangled in the bedding  
18 or caught between the headboard and mattress. The fact that the  
19 sides are or are not detachable does not affect this performance  
20 in any substantial way.

21 However, the ability to detach the walls serves another  
22 purpose altogether different from securing the baby. Morton also  
23 promotes the invention protected by the '715 patent as a  
24 comfortable bed for the baby to use for naps or while traveling.  
25 To that end, the '715 patent describes the benefit of detachable  
26 walls in the portability of the unit and in reducing its size for  
27 easy storage when not in use. CSS, with integral walls, does not  
28 share these beneficial attributes. To find equivalence, these

1 benefits must be ignored.

2       The '715 patent itself describes these benefits as  
3 "important." col. 3, ln. 27-30. In fact, the Background of the  
4 Invention section of the '715 patent describes the bassinet the  
5 invention is designed to replace, and states that the walls that  
6 protect the infant while sleeping also "make the bassinet bulky  
7 and difficult to transport." '715 patent, col. 1, ln.26-27. The  
8 claimed invention is touted as being "portable, and is especially  
9 useful while traveling (in hotels, airports, while visiting  
10 friends or relatives, day care, at the park, etc.) to provide a  
11 familiar place for the infant to sleep." '715 patent, col. 2,  
12 ln. 26-29.

13       With the emphasis on portability made within the language of  
14 the patent itself, the key features in making the invention so  
15 portable cannot be ignored. Thus, the fact that claim 1  
16 specifies a support unit with detachable walls is a limitation on  
17 claim 1 to include detachable walls in the support unit.

18       The authority Morton cites in her opposition and also her  
19 surreply do not require a contrary holding. Those cases state  
20 that insubstantial differences between a claimed invention and  
21 the accused product can lead to a finding of equivalence even  
22 though not every limitation in the patent is found literally in  
23 the accused product. But nowhere does Morton point to a case in  
24 which a limitation that represents an important benefit of the  
25 invention was completely lacking in the accused product, yet  
26 equivalence still found. That is the case here, and this Court  
27 cannot find equivalence where the important benefits of the  
28 detachable walls to portability and storage are lacking in CSS.

1           C.     Dedication to the Public

2  
3           TFY finally argues that even if the detachable walls are  
4 somehow found to be equivalent to non-detachable walls, the use  
5 of non-detachable walls was dedicated to the public through  
6 disclosure, and since they were not claimed in the patent, cannot  
7 be held infringing.

8           It is well established that "'subject matter disclosed but  
9 not claimed in a patent application is dedicated to the public.'" Maxwell v. J. Baker, Inc., 86 F.3d 1098, 1106 (Fed. Cir. 1996)  
10 (quoting Unique Concepts, Inc. v. Brown, 939 F.2d 1558, 1562-63  
11 (Fed. Cir. 1991)); see also Miller v. Bridgeport Brass Co., 104  
12 U.S. 350, 352 (1881) ("[T]he claim of a specific device or  
13 combination, and an omission to claim other devices or  
14 combinations apparent on the face of the patent, are, in law, a  
15 dedication to the public of that which is not claimed."). This  
16 rule applies to both literal infringement and equally to  
17 infringement under the doctrine of equivalents. J. Baker, 86  
18 F.3d at 1107. The rationale behind the rule is that the patentee  
19 should not be permitted to "write narrow claims for allowance by  
20 the [USPTO] and subsequently attempt to broaden the claims in  
21 court by using the doctrine of equivalents." PSC Computer  
22 Prods., 355 F.3d at 1357.

23  
24           Morton concedes that non-detachable walls were inadvertently  
25 left unclaimed because claim 2 was written as a dependant claim.  
26 No argument has been made that claim 2 should be read as an  
27 independent claim or that CSS infringes any claim other than  
28 //

1 claim 1. As written, claim 2 is dependent on claim 1.<sup>2</sup>  
2 According to the USPTO, a "dependent claim" is "a claim that  
3 refers back ('depends on') to and further limits a preceding  
4 dependent or independent claim. A dependent claim shall include  
5 every limitation of the claim from which it depends."  
6 <http://www.uspto.gov/main/glossary/index.html#e>. Additionally,  
7 Morton concedes that the accused product, CSS, does not literally  
8 infringe any claim in her patent. Mot. Prelim. Inj. at 9, n.3.

9 A support unit with integral walls, as compared to one with  
10 detachable walls, is disclosed in the Summary of the Invention,  
11 '715 Patent, Col. 1, ln. 64-65, and in the Detailed Description  
12 of the Preferred Embodiments, '715 Patent, Col. 4, ln. 15-19.  
13 Therefore, unless the '715 patent effectively claims a support  
14 unit with integral walls, Morton dedicated the use of a support  
15 unit with integral walls to the public. As explained above, the  
16 '715 patent does not claim such a support unit, and therefore it  
17 was dedicated to the public.<sup>3</sup> Accordingly, the use of a support  
18 unit with integral walls cannot, as a matter of law, be held to  
19 infringe Morton's patent.

20 Morton contends that her failed attempt to claim a support  
21 unit with integral walls in claim 2 of the '715 patent somehow  
22 prevents such a support unit from being dedicated to the public.

---

23  
24 <sup>2</sup> Claim 2 reads: "The infant bed of claim 1 wherein said  
25 base panel, end wall and side walls are integrated into a single  
unit." '715 patent, col. 5, ln 38-39.

26 <sup>3</sup> A support unit with integral walls might be within  
27 claim 7, which is silent as to whether the walls are detachable  
28 or integrated into the support unit. Claim 7 contains a  
limitation that requires a plurality of openings for receiving  
suction cups. CSS contains no such openings, and Morton does not  
argue that CSS infringes claim 7.

1 According to Morton, the fact that she tried to claim such a  
2 support unit shows she did not intend to dedicate a one-piece  
3 support unit to the public. This argument misses the mark.

4 Patent law is clear as to the recourse available to a  
5 patentee that fails to effectively claim an invention. "Within  
6 two years from the grant of the original patent, a patentee may  
7 file a reissue application and attempt to enlarge the scope of  
8 the original claims to include the disclosed but previously  
9 unclaimed subject matter." R.E. Service Co., 285 F.3d at 1055.

10 Morton has already filed such a reissue application to correct  
11 claim 2. Should that application be granted, TFY concedes that  
12 CSS would be within the scope of claim 2 of the '715 patent, and  
13 therefore be literally infringing upon it. However, that does  
14 not enter into the decision faced by this Court. For even if the  
15 '715 patent is reissued, TFY would not be prevented from  
16 producing CSS.

17 Patent law specifically addresses this effect of patent  
18 reissue in 35 U.S.C. § 252. In the event the '715 patent is  
19 reissued, it will be reissued with an effective date the same as  
20 that of the original issue. However, anyone who has made a  
21 product that would be infringing of the patent as reissued but  
22 not of the patent as originally issued is not affected by the  
23 reissue. 35 U.S.C. § 252. They are, in effect, "grandfathered  
24 in", and may continue to produce the now-infringing item. Thus,  
25 even if CSS would be infringing of the '715 patent if it is  
26 reissued, TFY would be permitted to continue to produce CSS.  
27 Therefore, the potential effect of reissuing the '715 patent with  
28 claim 2 stated as an independent claim rather than a dependent

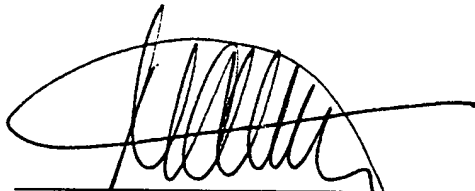


1 CONCLUSION

2  
3 For the reasons more fully explained above, Morton's motion  
4 for a preliminary injunction is DENIED. TFY's motion for summary  
5 judgment of non-infringement is GRANTED.  
6

7 IT IS SO ORDERED.

8 DATED: MAR 16 2004



9  
10 MORRISON C. ENGLAND, Jr.  
11 UNITED STATES DISTRICT JUDGE  
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28

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

04-1308

FARAH D. MORTON and BABY DELIGHT, INC.,

Plaintiffs-Appellants,

v.

THE FIRST YEARS, INC.,

Defendant Appellee.

**ORDER**

# United States Court of Appeals for the Federal Circuit

## O R D E R

A combined petition for panel rehearing and for rehearing en banc having been filed by the APPELLANTS, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,


UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on April 1, 2005.

FOR THE COURT,

  
Jan Horbaly  
Clerk

Dated: March 25, 2005

cc: Mark D. Miller  
John M. Skenyon

**FILED**  
U.S. COURT OF APPEALS FOR  
THE FEDERAL CIRCUIT

MAR 25 2005

**JAN HORBALY**  
**CLERK**

MORTON V THE FIRST YEARS, 04-1308  
(DCT - 03-CV-2339)

\*\*\*\*\*  
\*  
\* Note: Pursuant to Fed. Cir. R. 47.6, this order is not \*  
\* citable as precedent. It is a public record. \*  
\*  
\*\*\*\*\*